No. 94-859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF CONGRESSMAN BILL BAKER (R-CA), CONGRESSMAN RICHARD POMBO (R-CA), AND THE BUILDING INDUSTRY ASSOCIATION OF NORTHERN CALIFORNIA AS *Amici Curiae* in Support of Respondents

Virginia S. Albrecht
Counsel of Record
Beveridge & Diamond, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005
(202) 789-6000

Paul B. Campos
General Counsel
Building Industry Association of Northern California
Post Office Box 5160
200 Porter Drive, Suite 200
San Ramon, CA 94583
(510) 820-7626

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The individuals and organization listed above respectfully file this brief as *amici curiae* in support of Respondents. Written consent has been obtained from counsel for Petitioners and Respondents for the filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the clerk's office.

INTEREST OF *AMICI CURIAE*

Congressmen Bill Baker (R-CA) and Richard Pombo (R-CA) are Members of the United States House of Representatives, representing the 10th and 11th Districts in California, respectively. The Congressmen have a two-fold interest in this case. First, as members of the Legislative Branch, they believe

that the U.S. Fish & Wildlife Service, an agency of the Executive Branch, has infringed impermissibly on the power of the Legislative Branch by issuing a regulation that exceeds the scope of the Endangered Species Act of 1973. Second, as the elected representatives of farmers, business people, landowners, and others who are regulated under the Endangered Species Act of 1973, the Congressmen are concerned that the U.S. Fish & Wildlife Service has exceeded the scope of its authority and in the process caused severe hardships for their constituents.

The Building Industry Association of Northern California ("BIANC") is a non-profit association of homebuilders and related professionals. BIANC's members have been adversely affected by the U.S. Fish & Wildlife Service's application of its "harm" regulation to normal homebuilding activities.

STATEMENT OF THE CASE

Amici adopt the statement of the case contained in the Brief for Respondents.

SUMMARY OF ARGUMENT

> Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution . . . . [I]t is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to *administer* the laws.

Tennessee Valley Auth. v. *Hill*, 437 U.S. 153, 193 (1978)(emphasis added).

The issue presented by this case is whether the U.S. Fish & Wildlife Service ("FWS" or "Service"), an agency of the Executive Branch, has exceeded its authority by defining the term

"harm" in the Endangered Species Act of 1973 ("ESA" or "Act"), 16 U.S.C. §§ 1531-1544[1], to include modification of the habitat of endangered and threatened species. *Amici* contend that it has. The Service's expansive[2] definition of "harm" conflicts with Congress' "unambiguously expressed intent"[3] regarding the federal government's authority to regulate habitat modification under the Act.

The argument of *amici* can be summarized thusly. First, as the Service (often) emphasizes, the Act does state that one of its purposes is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[4]

Second, in enacting the Endangered Species Act of 1973 and subsequent amendments thereto, Congress created a clear,

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[1] The Endangered Species Act is jointly administered by the Secretary of the Interior and the Secretary of Commerce. The Act delegates most responsibilities to FWS and the National Marine Fisheries Service ("NMFS").

[2] *Amici* have reason to question the Solicitor General's contention that "the court of appeals greatly exaggerated the breadth of the 'harm' regulation," and that there are "significant limitations on the regulation's application." Pet. App. 19. *See, e.g.*, FWS Comments to City of Livermore, Alameda County, California, Regarding Private Development Project Tentative Tract Map #6686 (Aug. 5, 1994)("'Harm' has been further defined to include habitat destruction when it kills or injures a listed species by interfering with essential behavioral patterns, such as breeding, foraging, or resting. *Indirect adverse impacts, such as construction of buildings, roads or fences, that interrupt or prohibit the movement patterns of a listed animal species could be considered 'take' by the Service.*") (emphasis added). In addition, from 1988-93, the Service has on seven occasions prosecuted and obtained convictions under Section 9 of the Act for "modification of habitat." These convictions are distinguished from the 32 convictions based on species mortality. U.S. General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Land* (Dec. 1994) at 13.

[3] *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984).

[4] 16 U.S.C. §1531(b).

detailed, and unambiguous process under which the federal government would regulate the effects of development projects and other economic activity on the ecosystems (habitat) of endangered and threatened species.

Third, the clear, detailed, and unambiguous process created by Congress is the designation of critical habitat pursuant to Section 4 of the Act, along with the concomitant stricture found in Section 7(a)(2), that any action authorized, funded, or carried out by a federal agency shall not "result in the destruction or adverse modification of habitat of such [endangered or threatened] species which is determined by the Secretary . . . to be critical . . . ."[5]

Fourth, Section 7(a)(2), which reaches not only federal actions and federal lands, but also any action authorized or funded by a federal agency, was intended to provide the *exclusive* authority for federal regulation of habitat modification.

Fifth, the Service's expansive definition of "harm" has allowed it to interpret and administer the critical habitat process—which Congress intended to be the Act's most "influential enforcement tool"[6]—in a manner that is flatly inconsistent with the Act.

Sixth, by regulating habitat modification almost exclusively within the ambit of its expansive definition of "harm," the Service has eviscerated the carefully considered substantive and procedural provisions, including the consideration of economic impacts, that Congress wrote into the critical habitat designation process, with the result being a Service interpretation of the

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5. "This statutory directive is consistent with Congress' stated objective that the ESA 'provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.' " *Northern Spotted Owl* v. *Lujan*, 758 F. Supp. 621, 624 (W.D. Wash. 1991) (quoting Endangered Species Act, 16 U.S.C. §1531(b)).

6. J. Salzman, *Evolution and Application of Critical Habitat under the Endangered Species Act*, 14 Harv. Envtl. L. Rev. 311 (1990) [hereinafter Salzman].

critical habitat provisions that leads to unreasonable and absurd results.[7]

Seventh, the Service has consciously invoked its expansive definition of "harm" to regulate habitat modification in order to avoid the critical habitat designation process, which it perceives to be cumbersome, taxing, and controversial.

In sum, *amici* advance this fundamental argument: in determining whether an agency of the Executive Branch has improperly encroached on the functions of Congress, *i.e.* that it has interpreted a statutory term in a way that is inconsistent with the statute as it is written, or is an unreasonable interpretation of a statutory term, this Court should look primarily within "the four corners of the statute."[8] Within the four corners of the Endangered Species Act, not far from Section 9 and the prohibition on the "take" (including "harm") of endangered or threatened species, one finds a prohibition against the destruction or adverse modification of such species' critical habitat.[9] One also finds a Congressional definition of critical habitat, a detailed process for the designation of critical habitat, and an explicit provision for precluding designation of critical habitat upon consideration of the "economic impact, and any other relevant impact" of designating critical habitat.[10]

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7. *Compare* FWS, Designation of 6 Million Acres as Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1796, 1833 (1992) ("Based on the information discussed in this rule concerning public projects and private activities within critical habitat units, it is not clear whether significant economic impacts will result from the critical habitat designation.") *with* T. Gup, *Owl v. Man,* TIME , June 25, 1990, at 56 ("The possible result [of ESA restrictions]: mill closings and cutbacks costing 30,000 jobs over the next decade. Real estate prices would tumble, and states and counties that depend on those shares of the revenue from timber sales on federal land could see those funds plummet . . . . By decade's end, the plan could cost the U.S. Treasury $229 million in lost timber money each year").

8. *Gustafson* v. *Alloyd Co.*, 1995 U.S. LEXIS 1804, at *42 (Feb. 28, 1995) (Thomas, J., dissenting).

9. 16 U.S.C. § 1536(a)(2).

10. *See* 16 U.S.C. §§ 1532(5)(A), 1533(b)(2), 1533(b)(6)(C), 1533(b)(8).

Amici submit that the Service's expansive definition of "harm" is inconsistent with the language, structure, and intent of the Endangered Species Act of 1973. The Act admits of the regulation[11] of species habitat through one, and only one, mechanism: the critical habitat process. The Service, however, has bypassed the critical habitat process, choosing to regulate habitat through Section 9 and its expansive definition of "harm." In the process, the Service has ignored explicit Congressional policy concerning competing societal interests and the due process rights of property owners throughout the country.

ARGUMENT

THE SERVICE'S EXPANSIVE DEFINITION OF "HARM" IS INIMICAL TO THE LANGUAGE, STRUCTURE, AND INTENT OF THE ACT.

At issue in this case is the validity of a regulation issued by the U.S. Fish & Wildlife Service pursuant to the Endangered Species Act of 1973. The regulation, codified at 50 C.F.R. § 17.3, defines the statutory term "harm" in an expansive manner to include modification of the habitat of endangered and threatened species. Thus, by Executive regulation, the Service has made it a federal crime for private parties to use private property in a manner that the Service deems unsuitable for threatened and endangered species, notwithstanding the fact that there is no federal involvement and the property in question has not been designated critical habitat under the Act.[12]

This result is simply irreconcilable with the Endangered Species Act as it was written by Congress. In the Act, Congress provided an explicit and exclusive vehicle for federal regulation of development projects (both federal and nonfederal) that adversely affect the habitat (whether on federal or nonfederal

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11. As opposed to the preservation of habitat, which is accomplished through the land acquisition provisions of Section 5. 16 U.S.C. § 1534.

12. *See* U.S. General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Land* (Dec. 1994).

land) of endangered and threatened species. That vehicle is the critical habitat process. As demonstrated below, the Service's definition and administration of the "harm" regulation so marginalizes the critical habitat process, that the result is unreasonable and absurd.[13] It should also be noted that in marginalizing the critical habitat process, the Service has also collapsed Section 7's two distinct standards—"adverse modification" and "jeopardy"—into one, quite contrary to the intent of Congress. [14]

I. THE CRITICAL HABITAT PROCESS IS THE EXCLUSIVE MEANS WHEREBY THE FEDERAL GOVERNMENT IS AUTHORIZED TO REGULATE ACTIVITIES AFFECTING HABITAT UNDER THE ACT.

A. The Existing Critical Habitat Process.

The critical habitat process is clear, detailed, and unambiguous. Section 4(a)(3) of the Act provides that "[t]he Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable shall . . . designate any habitat of such species which is then considered to be critical . . . ." 16 U.S.C. § 1533(a)(3)(A).

Section 3(5)(A) defines critical habitat as "the specific areas within the geographical area occupied by the species, at the time it is listed . . . , on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection . . . and specific areas outside the geographical area . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." ESA at § 1532(5)(A).

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[13] *See Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892).

[14] *See* Salzman at 329-39; K. Yagerman, *Protecting Critical Habitat under the Federal Endangered Species Act*, 20 Envtl. L. Rev. 811, 833-44 (1990) [hereinafter Yagerman].

Section 3(5)(C) provides that "[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." ESA at § 1532(5)(C).

Section 4(a)(3) provides that "to the maximum extent prudent and determinable," critical habitat shall be designated concurrently with the determination to list a species as endangered or threatened. ESA at § 1533(a)(3)(A).

Section 4(b)(2) provides that prior to designating any area as critical habitat, the Secretary shall take "into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." ESA at § 1533(b)(2).

Section 4(b)(2) also provides that "[t]he Secretary may exclude any area from critical habitat if he determines that the benefits *of such exclusion* outweigh the benefits of specifying such area as part of the critical habitat, unless he determines . . . that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.* (emphasis added).

Section 4(b)(6)(C) provides that if a final regulation designating critical habitat is not published concurrently with the final regulation listing the species, the Secretary must, within a one-year period, "publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat." ESA at § 1533(b)(6)(C).

Section 4(b)(8) provides that "[t]he publication . . . of any proposed or final regulation . . . shall include a summary by the Secretary of the data on which such regulation is based . . . and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities

(whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation."[15] ESA at § 1533(b)(8).

Section 7(a)(2) provides that any action authorized, funded, or carried out by a federal agency shall not "result in the destruction or adverse modification of habitat of such [endangered or threatened] species which is determined by the Secretary to be critical." ESA at § 1536(a)(2).

The foregoing discussion demonstrates that (1) Congress contemplated federal regulation of endangered and threatened species habitat, (2) Congress crafted a detailed process by which such regulation would occur, and (3) Congress tempered such regulation by mandating the consideration of its economic and other impacts. Since Congress thoughtfully created the critical habitat process, with its balancing of competing interests and its requirement of formal rulemaking, it is difficult to conceive how Congress could have intended to allow the Service to circumvent that process entirely through the use of Section 9. This difficulty is compounded when one considers the history of the critical habitat process.

B. The Original Critical Habitat Process.

The Endangered Species Act, as enacted originally in 1973, neither defined critical habitat nor provided a process for its designation. Indeed, it has been suggested that Congress was "oblivious" to the "potentially absolute power" of Section 7(a)(2), including the prohibition against the destruction or adverse modification of critical habitat.[16]

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[15] 50 C.F.R. § 424.12(c) provides that "[e]ach critical habitat will be defined by specific limits using reference points and lines as found on standard topographic maps of the area. Each area will be referenced to the State(s), county(ies), or other local governmental units within which all or part of the critical habitat is located."

[16] Salzman at 316.

Undefined by the statute itself, critical habitat was defined by Service regulation:

> 'Critical habitat' means any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.

43 Fed. Reg. 870, 874 (1978).

Congress did not remain oblivious to the importance of the Act's critical habitat provisions. Nor did it remain oblivious to the Act's lack of standards and procedures for designating critical habitat, or to the Service's expansive definition of critical habitat. As will be discussed below, this Court's decision in *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153 (1978) ("*Hill*"), brought these issues to Congress' attention in resounding fashion. Also discussed below will be Congress' reaction to the decision—in particular, Congress' wholesale revision of the critical habitat process.

C. The *Hill* Decision and Congressional Reaction: the 1978 Amendments To the Critical Habitat Process.

On June 15, 1978, the U.S. Supreme Court issued its decision in *Hill*. The Court framed the questions presented as follows: "(a) would TVA [the Tennessee Valley Authority] be in violation of the Act if it completed and operated the Tellico Dam as planned? (b) if TVA's actions would offend the Act, is an injunction the appropriate remedy for the violation?" *Hill*,

437 U.S. at 172. Notwithstanding the $100 million that Congress had already expended on the Tellico Dam, the Court held that "both questions must be answered in the affirmative." *Id.*

The Court based its decision on its determination that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act. Its very words affirmatively command all federal agencies 'to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence' of an endangered species or 'result in the destruction or adverse modification of habitat of such species . . .' " *Hill*, 437 U.S. at 173 (citation and emphasis omitted).

Applying the language of the Act, language that "admits of no exception,"[17] the Court concluded that operating the Tellico Dam constituted a "carrying out" of an action that had been "authorized" and "funded" by a federal agency, and that such action did not "insure" that the snail darter's habitat would not be disrupted. *Hill*, 437 U.S. at 172. The Court therefore enjoined completion and operation of the Tellico Dam.

In dissent, Justice Powell stated that "I have little doubt that Congress will amend the Endangered Species Act to prevent the grave consequences made possible by today's decision." *Hill*, 437 U.S. at 210 (Powell, J., dissenting). Congress soon proved Justice Powell prescient.[18]

Almost immediately following publication of the *Hill* decision, Congress enacted the 1978 Amendments.[19] The 1978 Amendments effected two substantial revisions to the Act. First, the 1978 Amendments established a Cabinet-level group denominated the Endangered Species Committee. The newly-created

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17. *Hill*, 437 U.S. at 173.

18. *See, e.g.*, Salzman at 317 (the *Hill* decision "halted construction of the dam, triggered hearings on Capitol Hill, and evoked public cries to amend the ESA.").

19. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978) [hereinafter "1978 Amendments"].

committee was empowered to exempt a project from the Act if, among other things, the project "is of regional or national significance."[20]

Second, and more important for the question in this case, the 1978 Amendments produced a wholesale revision of the Act's critical habitat provisions. The revision created the critical habitat process that is in place currently, *see supra*.[21]

As previously discussed, Congress' revisions created a clear, detailed, and unambiguous process under which the federal government would have authority to regulate development projects and other economic activity that affected the habitat of endangered and threatened species. The revised critical habitat process included the following elements: (1) an explicit Congressional definition of critical habitat; (2) a presumption against designating a species' entire habitat as critical habitat; (3) a presumption that critical habitat be designated for all listed species; (4) a presumption that the designation of critical habitat be concurrent with the listing of the species; (5) a requirement that the economic impacts of designating critical habitat be considered; (6) a provision allowing the exclusion of any area as critical habitat if the benefits of such exclusion (and therefore the costs associated with inclusion) outweigh the benefits of designating that area as critical habitat; and (7) a presumption that concurrent with the designation of critical habitat, the Service identify those activities that may be affected by the designation.

The scope and detail of the critical habitat process are, themselves, a striking indication of the significance which Congress attached to the critical habitat process. They are also fundamentally inconsistent with the notion that the Act allows

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[20] 16 U.S.C. § 1536(h)(1)(A)(iii).

[21] In 1982 Congress modified that process slightly, providing two narrow exceptions to the requirement that designation of critical habitat occur concurrently with the listing of endangered species. *See* Salzman at 322, 323.

the regulation of species habitat through any other mechanism. This point is underscored when one considers that the 1978 Amendments were a Congressional reaction to the first judicial illustration of the vast potential reach of Section 7's habitat modification provisions.

It is clear that through the 1978 Amendments, Congress intended to restrict the scope of the Act. Equally clear is that Congress intended to do so by limiting federal authority to regulate habitat modification.[22] Indeed, Senator Garn, the Senate sponsor of the 1978 Amendments that revised the critical habitat process, "predict[ed] that the ESA might be gutted entirely

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22. "[T]he existing regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." H.R. Rep. No. 1625, 95th Cong., 2d Sess. 25 (1978); "[The agency regulation] substantially increases the amount of area involved in critical habitat designation and therefore increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." S. Rep. No. 874, 95th Cong., 2d Sess. 10 (1978). *See also* O. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. Colo. L. Rev. 278, 297 (1993) [hereinafter Houck] ("The concept of protecting critical habitat . . . was attacked vigorously . . . following the Tellico Dam decision, leading Congress in 1978 to provide two safety valves to its application to development projects. The first, on the front end, is an economic screen for determining critical habitat for listed species . . . . The second . . . is an exemption process for projects that would destroy critical habitat . . . .)."

See G. Coggins and I. Russell, *Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America*, 70 Geo. L.J. 1433, 1495 (1982) ("[W]e think it is time to come to grips with the negative impact of this Act on man. In addition to the Act's adverse effects on the use of federally-owned lands, its potential for infringing upon private property rights is frightening. If a threatened or endangered species has a *critical habitat* on private land, the private landowner could be prevented from enjoying his constitutional right to full use of his land" (emphasis added)) (quoting joint statement of the National Cattlemen's Ass'n, Public Lands Council, and National Woolgrowers Ass'n).

unless it were amended . . . [to] introduc[e] cost-benefit analysis in section 7 decisions."[23] The 1978 Amendments were therefore the product of Congressional balancing of the competing interests of federal regulation of habitat and economic activity. Through its habitual use of Section 9 and its expansive definition of "harm," the Service has done an end-run around the substantive and procedural provisions which Congress deliberately wrote into the Act to reflect that balancing.

II. WHILE CONGRESS INTENDED THE CRITICAL HABITAT PROCESS TO BE A CORNERSTONE OF THE ACT, AND A BALANCE BETWEEN SPECIES' HABITAT REGULATION AND ECONOMIC CONSIDERATIONS, THE SERVICE HAS TRIVIALIZED THE CRITICAL HABITAT PROCESS THROUGH ITS EXPANSIVE DEFINITION OF "HARM."

Commentators, courts, and legislators have recognized that the critical habitat process was to be a cornerstone of the Act.[24]

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[23] Salzman at 319. *See also* 124 Cong. Rec. 21,571, 21,572 (daily ed. July 19, 1978) (statement of Senator Garn) ("[W]e are only at the beginning of our experience with the Endangered Species Act. Over 1,800 plant species and 100 animal species have now been proposed for designation as endangered or threatened; more than 40 different habitats are being considered for designation as critical. And I point out to the Senate that some of these 'habitats' are of enormous size . . . . Senator McClure has already brought to the attention of the Senate the problems coming with the designation of the habitat of the grizzly bear . . . .").

[24] *See* Houck at 297 n.134 (1993) ("Nearly every commentator on the Endangered Species Act has noted the importance Congress placed on protecting the critical habitat of endangered and threatened species."); *Northern Spotted Owl* v. *Lujan*, 758 F. Supp. 621, 626 (W.D. Wash. 1991) ("The designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances."); 124 Cong. Rec., 21,575, 21,576 (daily ed. July 19, 1978) (statement of Senator Garn) ("It may well be the case . . . that the designation of critical habitat is more important than the designation of an endangered species itself . . . . Placing it on the list does not necessarily do that [protect the species]. If you do not have

(footnote continues)

This view is quite logical, given the language and history of the Act's critical habitat provisions. As envisioned—and written—by Congress, the critical habitat process was to balance the desire to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," with the need to consider the "economic and other impacts" of critical habitat designation. Whatever one's position regarding the wisdom of the 1978 Amendments, there is no denying their purpose and importance. The 1978 Amendments were no afterthought.[25]

The Service's administration of the critical habitat process stands in stark contrast to the scheme envisioned by Congress. Not only has the Service refused to designate critical habitat for the vast majority of listed species,[26] but in the rare instances in which it does designate critical habitat, the Service so trivializes the designation process as to render it virtually meaningless.

Service analyses of the economic impacts of critical habitat designations illustrate this point. As discussed above, the Act explicitly mandates the consideration of the economic impacts associated with critical habitat designations. Congress injected this requirement into the Act via the 1978 Amendments. The 1978 Amendments were enacted by Congress to balance habitat requirements with the economic costs to society resulting from habitat regulation. As shown below, the Service has all but erased economic impacts from the decisional process by construing the economic impacts of critical habitat designation as being

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(footnote continued)

the area designated for its critical habitat . . . then you may have infringements upon that area that could endanger the species.")

25. Indeed, "the inclusion of economic considerations in the designation process was sharply criticized by some [legislators], who argued that such considerations should only arise in the post-listing, post-designation exemption process." Yagerman at 832.

26. As of 1992, FWS and NMFS had not designated critical habitat for 546 of 651, or 84%, of listed species. U.S. General Accounting Office, *Endangered Species Act: Types and Number of Implementing Actions* at 26 (May 1992).

solely those economic impacts that are *in addition* to those occasioned by the listing of the species, in particular those occasioned by the Service's alleged authority to regulate habitat modification under its expansive definition of "harm."

The Service defines the economic impacts of critical habitat as follows:

> "[T]he impacts of designating critical habitat are in addition to the economic and other impacts attributable to (1) listing of the species, (2) economic effects resulting from conservation actions taken by other Federal agencies under section 7(a)(1) of the Act, and (3) regulatory actions required by other laws.
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> Section 9 of the Act and Service regulations prohibit the taking of delta smelt without express authorization from the Service. Under Service regulations, 'take' may include significant habitat modification or degradation that actually kills or injures protected species . . . . *Therefore, the direct economic and other impacts resulting from designation of critical habitat are relatively small because the Act provides substantial protection of habitat through the listing of the species itself* (emphasis added)."[27]

The foregoing Service interpretation of economic impacts, an inevitable by-product of its expansive definition of "harm," leads to a vast disparity between Service findings concerning the economic impacts of critical habitat proscriptions under the Act,

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[27] NMFS, Designation of Critical Habitat for the Delta Smelt, 59 Fed. Reg. 65,256, 65,261 (1994). *See also* FWS, Designation of Critical Habitat for the Mojave Population of the Desert Tortoise, 59 Fed. Reg. 5820, 5826 (1994) ("The economic analysis assumed those values that were in place prior to critical habitat (e.g., final Bureau of Land Management (BLM) plans, section 7 jeopardy standard, the Clark County short-term habitat conservation plan, *and section 9 prohibitions*) as the baseline for this analysis. As a result, critical habitat effects were those incremental impacts that would occur solely as a result of the critical habitat proposal above and beyond the effects of these other actions.") (emphasis added).

and common sense. *Compare* NMFS, Determination of Critical Habitat for the Snake River Chinook Salmon, 58 Fed. Reg. 68,543, 68,544 (1993) ("The economic and other impacts resulting from this critical habitat designation, over and above those arising from the listing of the species, are expected to be minimal."), *with* T. Kenworthy, *Sacrificing for Salmon*, Washington Post, Jan. 14, 1992 at A1 ("The impending sacrifices in behalf of the salmon represent another example of the sweeping power of the federal Endangered Species Act, which has seldom, if ever, been applied to a case involving so large an area or such a wide range of economic interests. The act already has put large swatches of Northwest timberland off-limits to logging to protect the northern spotted owl, and in the case of salmon it will affect the region's economic lifeline, the Columbia and its main tributary, the Snake."[28]

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[28] *See also*, NMFS, Designation of Critical Habitat for the Sacramento River Winter-Run Chinook Salmon, 58 Fed. Reg. 33,212, 33,218 (1993) ("The economic and other impacts resulting from this critical habitat designation, over and above those arising from the listing of the species under the ESA, are expected to be minimal . . . . The designation of critical habitat only duplicates and reinforces the substantive protection resulting from the listing; therefore, the economic and other impacts resulting from designation are expected to be minimal . . . ."); FWS, Designation of 6.4 Million Acres as Critical Habitat for the Mojave Population of the Desert Tortoise, 59 Fed. Reg. 5820, 5826 (1994) ("As a result of this analysis, the Service concluded that the economic impacts that would be incurred from critical habitat designation would not be significant to either the regional (seven-county) or national economy."); FWS, Designation of 6 Million Acres as Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1796, 1833 (1992) ("Based on the information discussed in this rule concerning public projects and private activities within critical habitat units, it is not clear whether significant economic impacts will result from the critical habitat designation."); FWS, Designation of Critical Habitat for the Concho Water Snake, 54 Fed. Reg. 27,377, 27,381 (1989) ("No significant economic or other impacts are expected from this designation of critical habitat for the Concho water snake."); FWS, Designation of Critical Habitat for the San Marcos Salamander, San Marcos Gambusia, Texas Wild Rice, and Fountain Darter, 45 Fed. Reg. 47,355, 47,362 (1980) ("The Service has prepared an impact analysis and believes that economic and

(footnote continues)

III. THE SERVICE HAS CONSCIOUSLY INVOKED AN EXPANSIVE DEFINITION OF "HARM" TO REGULATE HABITAT MODIFICATION IN ORDER TO AVOID THE CRITICAL HABITAT DESIGNATION PROCESS, WHICH IT PERCEIVES TO BE CUMBERSOME, TAXING, AND CONTROVERSIAL.

The Service designates critical habitat for approximately sixteen percent of the species listed as endangered or threatened.[29] This, despite the unmistakable emphasis Congress placed on designating critical habitat in the ESA. The question therefore arises: why is the Service so reluctant to utilize the critical habitat process?

Several explanations that might be proffered can be dismissed summarily. The notion that the economic impact analysis will overwhelm habitat protection considerations is implausible given the fact that the Service routinely dismisses economic impacts in practice. The notion that it is generally "not prudent" to designate critical habitat is so implausible as not even to pass

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(footnote continued)

other impacts of this action are not significant in the foreseeable future."); FWS, Designation of Critical Habitat for the Coachella Valley Fringe-Toed Lizard, 45 Fed. Reg. 63,812, 63,818 (1980) ("The Service has prepared an impact analysis and believes that economic and other impacts of this action are not significant in the foreseeable future."); FWS, Designation of Critical Habitat for the Least Bell's Vireo, 59 Fed. Reg. 4845, 4848 (1994) ("Numerous Federal, State, and local agencies have jurisdiction over the affected activities . . . . Although a number of agencies expressed concern that the designation of critical habitat would affect proposed or future projects and asked to have various project areas removed, the economic costs attributable to critical habitat for those projects are expected to be insignificant."); FWS, Designation of Critical Habitat for the Mount Graham Red Squirrel, 55 Fed. Reg. 425 (1990) (finding no significant economic or other impacts from designating critical habitat).

29. U.S. General Accounting Office, *Endangered Species Act: Types and Numbers of Implementing Actions* at 26 (May 1992).

the "red face" test.[30] The notion that critical habitat designation does not provide the Service with sufficient regulatory authority over the actions of nonfederal entities on private property, and that therefore the purposes of the Act can only be effectuated by reliance on an expansive definition of "harm," misperceives the potential scope of critical habitat designations and unlawfully expands the Service's authority under Section 9 of the Act.[31]

The Service's primary motivation for avoiding critical habitat designation is a political one. The general public operates under the assumption that the federal government possesses regulatory authority only over those areas that the Service has designated as critical habitat. This public perception, coupled with the requirement that critical habitat designations include

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30. "The proposition that the great majority of listed mammals, birds, reptiles, and amphibians are also so victimized by collectors that special protections for their habitat would not be prudent is largely a straw man for an institutional reluctance to go through the designation process, and to the designation itself." Houck at 305. *See also*, H.R. Rep. No. 1625, 95th Cong. 2d Sess. 17 (1978). ("The committee intends that in most situations the Secretary will, in fact, designate critical habitat at the same time that a species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species.").

31. "The number of private projects and activities that could run into [§7] problems under the Act is coextensive with the regulatory and financial reach of the federal government. These private actions include, but are not limited to, every project that affects a navigable waterway, every water pollution point source, every housing project financed by the Department of Housing and Urban Development, every offshore oil lease, every deep sea mining operation, every major hydropower project, every interstate natural gas pipeline, every federally financed highway, and every significant coastal zone activity," Coggins and Russell at 1513-14 (citations omitted); *see also* 16 U.S.C. § 1533(b)(8) (any proposed or final regulation designating critical habitat "shall . . . include a description and evaluation of those activities (*whether public or private*) which . . . may adversely modify such habitat, or may be affected by such designation") (emphasis added).

detailed maps, often creates public opposition that the Service would prefer to avoid:

> [T]here is a genuine reluctance on the part of Fish and Wildlife to designate critical habitat based on other factors. Designation has been a source of vociferous public opposition in a number of cases. Fish and Wildlife is reluctant to arouse that sleeping dragon and is very much predisposed to find a reason of imprudence."

Interview with Michael J. Bean, Chairman, Wildlife Program, Environmental Defense Fund (Feb. 10, 1989), quoted in Salzman at 333-34 n.98.[32]

The Service has largely eschewed the critical habitat process for political reasons, choosing to regulate habitat modification through its expansive definition of "harm." In essence, the Service has deconstructed the Act, discarded the critical habitat process, along with its substantive and procedural elements, and seized on a statement of purpose concerning ecosystem conservation as a justification for making a federal crime out of modifying non-critical habitat.

In the process, the Service has subverted at least three key provisions of the Act: (1) that habitat regulation be tempered by

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[32] *See also* Interview with Donald Barry, Former Assistant Solicitor for Fish and Wildlife, Department of the Interior (Feb. 11, 1989), quoted in Salzman at 335-36 ("[critical habitat] maps galvanize opposition immediately. The local Chamber of Commerce goes into a siege mentality and hits the panic button. Most Members [of Congress] have run into an endangered species in their districts."); Interview with John Spinks, Former Director, Office of Endangered Species, U.S. Fish and Wildlife Service (March 15, 1989), quoted in Salzman at 336 ("[C]ritical habitat can lead to serious problems with local people and creates a very hostile opposition to the species. As soon as you draw a line on the map, they see it as the first step toward the feds condemning the land . . . . It may be paranoid, but it was a commonplace problem that led to us protecting species in a terribly hostile context. Time after time and place after place we faced local opposition and hostility.").

economic considerations; (2) that habitat subject to federal regulation meet strict biological criteria; and (3) that property owners, who face federal criminal prosecution for violating the Act, be given adequate *notice and opportunity to be heard* regarding potential federal regulation of private property under the Act. [33]

CONCLUSION

For all of the foregoing reasons, the Court should strike down the Service's expansive definition of "harm." Members of the Court have previously expressed the concern that "the reach of this regulation . . . is virtually limitless." *Hill* at 208 (Powell and Blackmun, JJ., dissenting).

It is time for the Court to act on that concern. For "while the Department of the Interior has been busy making as little as possible out of the mandatory provisions of section 7 [regarding critical habitat], it has allowed sections 9 and 10 to grow into something substantial, to the point that the two programs . . . have begun to merge into one large and largely-discretionary exercise."[34]

Through this large and discretionary exercise, the Service has undermined explicit Congressional directives and severely

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[33] *See* 16 U.S.C. § 1533(b)(8)(requiring description of private activities potentially subject to critical habitat regulation); 16 U.S.C. § 1533(b)(5)(E) (requiring public hearing on proposed regulation to designate critical habitat, if requested by any person).

[34] Houck at 352.

infringed on the due process rights of property owners. The decision below should be affirmed.

Respectfully submitted,

Virginia S. Albrecht
Counsel of Record
Beveridge & Diamond, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005
(202) 789-6000

Paul B. Campos
General Counsel
Building Industry Association of Northern California
Post Office Box 5160
200 Porter Drive, Suite 200
San Ramon, CA 94583
(510) 820-7626

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